

JUN 12 1978

MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

October Term, 1977

No. **77-1764**

JOHN J. McLAUGHLIN,

Petitioner

-vs-

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EDWARD F. McLAUGHLIN
60 East 42nd Street
New York, New York 10017
(212) 661-0560

Attorney for Petitioner

I N D E X

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the case	8
Reasons for granting writ	11
Conclusion	12
Appendix A:	
Judgment order dated 11 May, 1978	1a
Order dated 26 May 1978	3a
Judgment and commitment order dated 26 Aug. 1977	4a
Appendix B:	
Copy of letter from United States Attorney Eastern District of Pennsylvania dated 12 July 1977	5a
<u>Table of Cases</u>	
Spies v. United States, 317 U.S. 492	11
United States v. Alker, 260 F.2d 135	11

	Page
United States v. Frank, 245 F.2d 284	11
United States v. Litman, 246 F.2d 206	11
United States v. Long, 257 F.2d 340	11
United States v. Murdock, 290 U.S. 389	11
United States v. Palermo, 259 F.2d 872	12
United States v. Rosenfield, 469 F.2d 598 (3rd Cir. 1972)	12
United States v. Vitiello, 363 F.2d 240	11

Statutes

United States Constitution Fifth Amendment	3,12
Internal Revenue Code of 1954 26 USC Sec. 7203	4,9
Privacy Act of 1974 5 USC Sec. 552a(e)(3)	4,5,12
Federal Rules of Criminal Pro- cedure Rule 11(e)	5,9
Rule 52(b)	7
Federal Rules of Evidence Rule 404	7,8

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

JOHN J. McLAUGHLIN,

Petitioner

-vs-

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

The Petitioner (John J. McLaughlin) prays that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered on May 11, 1978.

OPINIONS BELOW

No opinions were submitted by the Court of Appeals or the United States District Court for the Eastern District of Pennsylvania. Copies of the judgment order of the Court of Appeals and the judgment and commitment order of the District Court are set forth in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on May 11, 1978 and the mandate of the Court was stayed until June 10, 1978, pursuant to an order dated May 26, 1978 (Appendix A). The jurisdiction of the Supreme Court is invoked pursuant to 28 USC Section 1254(1).

QUESTIONS PRESENTED

1. Was evidence of Petitioner's mere failure (as opposed to wilful failure) to file other tax returns, not charged in the Information, properly admissible as proof that the Petitioner wilfully failed to file the tax returns charged in the Information?
2. Did the admission of such evidence constitute reversible error?
3. If such evidence were admissible, does it properly produce the cumulative effect of proof, beyond a reasonable doubt, of the Petitioner's wilfulness with respect to his failure to file tax returns as charged in the Information?
4. Did the Petitioner's conviction, in the light of the instructions and information furnished to the Petitioner by the Internal Revenue Service, violate the Petitioner's right to due process as guaranteed by the Fifth Amendment to the Constitution of the United States as amplified by the provisions of the Privacy Act of 1974?
5. Did the stated position of the United States Attorney for the Eastern District of Pennsylvania, with respect

to the negotiation of a plea in this case, constitute prosecutorial misconduct?

6. Was it proper appellate review procedure for the Court of Appeals to affirm the judgment of the District Court as non-violative of the Petitioner's right under the Fourteenth Amendment to the Constitution, when the Petitioner contended on appeal that his rights under the Fifth Amendment had been violated?

STATUTES INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States and various Federal statutes, as follows:

Fifth Amendment to the Constitution of the United States

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

26 USC Section 7203

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

5 USC Section 552a(e)(3)

"(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--

"(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

"(B) the principal purpose or purposes for which the information is intended to be used;

"(C) the routine uses which may be

made of the information, as published pursuant to paragraph (4) (D) of this subsection; and

"(D) the effects on him, if any, of not providing all or any part of the requested information;

18 USC Federal Rules of Criminal Procedure Rule 11(e)

(e) Plea Agreement Procedure.

"(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

"(A) move for dismissal of other charges; or

"(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

"(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

"(2) Notice of Such Agreement. If a plea agreement has been reached by the

parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

"(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

"(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

"(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

"(6) Inadmissibility of Pleas, Offers of Pleas, and Related Statements.

Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel."

18 USC Federal Rules of Criminal Procedure Rule 52(b)

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

28 USC Federal Rules of Evidence Rule 404

"(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

"(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused,

or by the prosecution to rebut the same;

"(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

"(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

"(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to provide the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

STATEMENT OF THE CASE

The Petitioner, 59 years old, is a self-employed osteopathic physician who has been practicing in York, Pennsylvania for the past 32 years. He is married and the father of three children. His son is a minor and the Petitioner is supportive of his aged parents who also reside in York, Pennsylvania.

The Petitioner was investigated by the Internal Revenue Service for failure to file income tax returns for 1965, 1966 and 1967, but no charges were lodged against him. The Petitioner has not previously been charged or convicted of any crime, and his general reputation in his community is excellent.

On June 17, 1977 the Petitioner was served with an Information charging him with wilful failure to file federal income tax returns for 1972, 1973 and 1974 in violation of 26 USC Section 7203. Thereupon, Petitioner retained counsel and pleaded not guilty at Arraignment.

Petitioner's counsel, without success, endeavored to negotiate a plea agreement under Rule 11(e) of the Federal Rules of Criminal Procedure. The position of the Respondent, with respect to a plea agreement in this case, is stated in a letter from the United States Attorney's office dated July 12, 1977 (Appendix B). Allegedly, this position represented a policy of increased prosecution of white-collar crime as the resultant aftermath of the Watergate incident.

On July 25, 1977 trial was held in the United States District Court, sitting without a jury. In the main, the Respondent's evidence was that the Petitioner had previously been investigated for failure to file federal income tax returns, that he had failed to file state and local tax returns and had failed to file Federal income tax returns for 1975 and 1976. Not only were these alleged tax defaults not

charged in the Information, but the Respondent failed to introduce any evidence to show that the Petitioner was either under a duty to file or had been charged and found guilty of wilful failure to file such returns.

The Petitioner's evidence consisted of character witnesses and the Petitioner's testimony that his reasons for not filing income tax returns was lack of funds and that he had no knowledge that failure to file was a criminal offense.

On the afternoon of July 25, 1977, the District Court, from the bench, found the Petitioner guilty on all three counts as charged and on August 26, 1977 the Petitioner came before the District Court for sentencing. At sentencing, the Respondent strongly recommended the incarceration of the Petitioner and alleged that he had, in effect, been guilty of the crime of tax evasion. The District Court characterized the Petitioner's offense as a white-collar crime and sentenced the Petitioner to a prison term of four months, a \$5,000 fine and five years conditional probation.

The Petitioner appealed to the Court of Appeals certifying that the Appeal was from a final decision within the meaning of 28 USC Section 1291.

The Petitioner's brief on appeal contended, in substance, that the District Court had erred in admitting extraneous and unproved pattern evidence, that his conviction was contrary to the law and the facts, that the evidence

did not prove guilt beyond a reasonable doubt and that his conviction violated his rights under the due process clause of the Fifth Amendment to the Constitution of the United States as codified by the Privacy Act of 1974.

No oral argument was permitted and the appeal was submitted to the Court of Appeals under Third Circuit Rule 12(6) on May 3, 1978. On May 11, 1978, the Court of Appeals entered judgment affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The judgment of the District Court, affirmed by the Court of Appeals, is contrary to this Court's interpretation of wilfulness. In United States v. Murdock (1933), 290 U.S. 389 and Spies v. United States (1943) 317 U.S. 492, it held that wilfulness connoted bad faith or evil intent and included some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.

Similarly, the Petitioner's conviction is contrary to the views of the Third Circuit in the following cases: United States v. Alker, 260 F.2d 135, 157 (3rd Cir. 1958), cert. denied, 359 U.S. 906 (1959); United States v. Frank, 245 F.2d 284 (3rd Cir. 1957) cert. denied, 355 U.S. 819 (1957); United States v. Litman, 246 F.2d 206 (3rd Cir. 1957), cert. denied, 355 U.S. 869 (1957); United States v. Long, 257 F.2d 340 (3rd Cir. 1958); United States v. Vitiello, 363 F.2d 240 (3rd Cir.

1966); United States v. Rosenfield, 469 F.2d 598 (3rd Cir. 1972), cert. denied, 411 U.S. 932 (1973); United States v. Palermo, 259 F.2d 872 (1958, CA3).

Furthermore, the Petitioner's contention that his conviction should be reversed because the instructions and information furnished by the Internal Revenue Service do not comply with basic principles of due process provided by the Fifth Amendment to the Constitution, as codified by the Privacy Act of 1974, presents an important question of Constitutional law, which has not been, but should be, resolved by this Court.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Edward F. McLaughlin
Counsel for Petitioner
Admitted to practice in
this Court on May 5, 1958

APPENDIX A

1a

JUDGMENT ORDER DATED 11 MAY, 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-2559

UNITED STATES OF AMERICA

V.

JOHN J. McLAUGHLIN,

Appellant

On Appeal from the United States Dis-
trict Court for the Eastern District
of Pennsylvania
Crim. No. 77-259

Submitted Under Third Circuit
Rule 12(6) May 3, 1978

Before: ADAMS, VAN DUSEN and ROSENN,
Circuit Judges.

JUDGMENT ORDER

After consideration of the conten-
tions raised by appellant, namely, that
(1) the government did not prove beyond
a reasonable doubt that the taxpayer's
failure to file tax returns was, in law
and in fact, wilful; (2) the information

2a

supplied and the procedures employed by
the Internal Revenue Service were in
violation of the taxpayer's right under
the Fourteenth Amendment to the Consti-
tution; and (3) the court erred in con-
sidering evidence and allegations of the
taxpayer's defaults in the filing and
paying of taxes, other than the failure
to file income taxes, it is

ADJUDGED and ORDERED that the
judgment of the district court be and is
hereby affirmed.

BY THE COURT,

S/ Arlin B. Adams
Circuit Judge

ATTEST:

S/ Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: MAY 11 1978

3a

ORDER DATED 26 MAY, 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2559

UNITED STATES OF AMERICA

VS.

JOHN J. McLAUGHLIN,
Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until June 10, 1978.

S/ Arlin M. Adams

Circuit Judge

Dated: May 26, 1978

JUDGMENT AND COMMITMENT ORDER
DATED 26 AUG. 1977

United States of America vs.

United States District Court for

JOHN J. MC LAUGHLIN

EDPA

DEFENDANT

DOCKET NO. → Crim. 77-259

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this dateMONTH DAY YEAR
7 26 77

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Edward P. McLaughlin

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTYFINDING &
JUDGMENTThere being a finding/verdict of ☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of Failure to File Income Tax Returns. 26 USC 7203.

SENTENCE
OR
PROBATION
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Four Months on Count 3.

IT IS ADJUDGED that on Count 2 the Defendant pay a fine to the United States in the sum of \$5,000.00.

IT IS ADJUDGED that on Count 1 the imposition of sentence is hereby suspended and the defendant is placed on probation for a period of 5 years upon the following terms and conditions:

1. That the fine is to be paid.
2. That payment of taxes, interest and penalties up to the date of the entry of this judgment be paid.
3. That the Defendant comply with all local, state and federal law.
4. That the Defendant comply with the rules and regulations of the probation department.

If the taxes, interest and penalties as determined by the Internal Revenue Service are paid before the period of probation is over, the Court will consider a reduction of probation.

The Defendant is to report to the United States Marshal, U.S. Federal Courthouse, 601 Market St., Phila., Pa. on or before 12:00 Noon on Tuesday, October 25, 1977 for commencement of sentence.

SPECIAL
CONDITIONS
OF
PROBATIONADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

2 cc Marshal
1 cc Prob.
1 c E.P. McLaughlin
1 c G. Tilles

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☐ U.S. Circuit Judge☒☐ U.S. Magistrate

Donald W. VanArtsdalen, Jr.

7/26/77

CERTIFIED AS A TRUE COPY ON

THIS DATE

BY

☐ CLERK☐ DEPUTY

APPENDIX B

LETTER FROM UNITED STATES ATTORNEY
EASTERN DISTRICT OF PENNSYLVANIA,
DATED 12 JULY 1977



ADDRESS ONLY TO
UNITED STATES ATTORNEY
AND REFER TO
ORIGINAL AND RETURN
DWM:GT:dmw
File #77-0412

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF PENNSYLVANIA
3310 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA, PENNSYLVANIA 19106

July 12, 1977

E.F. McLaughlin, Esquire
60 East 42nd Street
New York, New York 10017

Re: United States v. John J. McLaughlin
Criminal Number 77-259


Dear Mr. McLaughlin:

Enclosed please find copies of our Exhibit numbers W3-1,2; W5-3,4,5 and W7-2 and our Witness and Exhibit List as requested at our discovery conference held July 7, 1977. In addition you were permitted to examine all of the exhibits on the list.

The background of this case has been reviewed by my supervisors and the position of this office determined. Upon conviction after trial or after entry of a plea without plea bargain, we will recommend to the Court that a sentence of incarceration be imposed. If Dr. McLaughlin wishes to limit his potential imprisonment exposure, we would negotiate a plea bargain as to sentence, however the negotiated sentence would be for some term of imprisonment. We would discuss and negotiate the length only if we reached the point where you could state on behalf of Dr. McLaughlin a desire to plead guilty and accept some jail sentence.

Very truly yours,

David W. Marston
United States Attorney


Gary Tilles
Assistant United States Attorney

Enclosures

